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IN THE

Supreme Court of the United States

October Term, 1971

71 - 459

No. ------

ISBRANDTSEN TANKERS, INC.,
Petitioner,

v.

PRESIDENT OF INDIA, REPRESENTED BY THE DIRECTOR GENERAL OF THE INDIA SUPPLY MISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 28, 1971

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Isbrandtsen Tankers, Inc. petitions for a writ of certiorari to review the order and decision of the United States Court of Appeals for the Second Circuit dated July 27, 1971 (Appendix A) which affirmed the Order of the District Court dismissing on motion the second cause of action in the second amended complaint (Appendix B).

Opinions Below

The opinion of the Court of Appeals (Appendix A) dated July 27, 1971 is not yet reported in the official reports. The opinion of the District Court (Appendix B) is not reported.

Jurisdiction

The decision and order of the Court of Appeals was made on July 27, 1971. The jurisdiction of this Court is invoked under U.S.C. 1254(1).

Question Presented

The question presented arises under paragraph 34 of the charter party dated July 7, 1966 which provides:

> "Any and all differences and disputes arising under this Charter Party are to be determined by the U.S. Courts for the Southern District of New York, but this does not preclude a party from pursuing any *in rem* proceedings in another jurisdiction or from submission by mutual agreement of any differences or disputes to arbitration."

The question is whether that provision, coupled with the appearance and answer of respondent in this action, including counterclaim and admission of jurisdiction of two causes of action, confers jurisdiction on the District Court notwithstanding the suggestion of immunity of the State Department obtained under date of September 16, 1970 and amended suggestion under date of October 9, 1970.

Statement of the Case

On July 7, 1966 petitioner and respondent entered into a charter party for a vessel to carry grain to India. Provision was made for discharge of the cargo into lightening vessels for transit of the Hooghly River. The lightening vessels arrived at Sandheads, at the mouth of the Hooghly River. In each instance a Notice of Readiness was tendered. The lightening vessels were delayed and prevented from commencing discharge, with substantial loss of time. Petitioner brought this action to recover damages for this delay.

The second amended complaint dated July 23, 1969 alleges claims for demurrage (first count), delay and deten-

tion (second count), and unpaid freight (third count). The respondent appeared and filed its answer dated December 16, 1969 to the second amended complaint.

The action was brought on January 31, 1968 in the United States District Court for the Southern District of New York pursuant to paragraph 34 of the charter party which provides:

> "34. Any and all differences and disputes arising under this Charter Party are to be determined by the U.S. Courts for the Southern District of New York, but this does not preclude a party from pursuing any *in rem* proceedings in another jurisdiction or from submission by mutual agreement of any differences or disputes to arbitration."

In its answer to the second amended complaint respondent admitted the provision in paragraph 34 of the charter party which was alleged in paragraph 5 of the second amended complaint and not denied in respondent's answer thereto and did not question the jurisdiction of the court in relation to the first and third causes of action for demurrage and freight.

Respondent has continued to admit jurisdiction of the District Court in relation to the claims for demurrage and unpaid freight but after the answer dated December 16, 1969 was filed, sought and obtained a suggestion of immunity from the State Department concerning the detention claim arising under the same charter party alleged in the second cause of action of the second amended complaint. The State Department under date of September 16, 1970 issued that suggestion of immunity followed by amended suggestion dated October 9, 1970 overlooking or ignoring the contract in paragraph 34 of the charter party under which respondent submitted to the jurisdiction of the United States District Court for the Southern District of New York. Respondent moved in the District Court to dismiss the second count on the basis of that suggestion of immu-

nity. Judge Croake by order dated January 13, 1971 granted the motion without specific reference to the provisions of the charter party. On appeal, the Court of Appeals affirmed the order of Judge Croake dismissing the second cause of action in the second amended complaint.

Reasons for Granting the Writ

The issue involved on this application is one of great public importance. We submit that this case comes within the intendment of Rule 19 which states the considerations governing review on certiorari. The decisions of the Courts below impaired the obligations of the contract in paragraph 34 of the charter party and fail to apply the rule that an appearance, answer and counterclaim confer jurisdiction. The decision of the Court below expressed sympathy with petitioner's position because of the difficult position in which such a holding places petitioner. The Court below based the decision on the ground that it had no alternative but to accept the recommendation of the State Department in spite of the contract in paragraph 34 of the charter party, the appearance of respondent, and respondent's counterclaim.

However, the opinion of the Court of Appeals clearly indicates that if it had felt it could re-examine the suggestion of immunity in the light of the Tate letter of 1952, the Court might well have found that the actions of the Indian Government were, as petitioner contends, "purely private commercial decisions". Petitioner contends that the Court could and should have re-examined the suggestion of immunity in the light of the Tate letter dated May 19, 1952 (26 State Dept. Bull. 984), the provisions of paragraph 34 of the charter party, the appearance of respondent, the admission by respondent of jurisdiction of two causes of action, and the counterclaim of respondent, and on such re-examination should have concluded that the doctrine of sovereign immunity should not be applied in this situation. The preservation of the constitutional principle of checks and balances

requires that the Court, the Judicial Branch of our Government, should not be prevented from reviewing the actions of the State Department in the Executive Branch of our Government.

We submit that the Court below erred in deferring to the policy pronouncement implicit in the suggestion of immunity of the State Department made at such a late date in this litigation, particularly in light of the contractual provision in paragraph 34 of the charter party. We further submit that the cases cited in the opinion of the Court of Appeals do not require or decide the main issue in this litigation, namely that the contract between the parties in paragraph 34 of the charter party should not be impaired or nullified by any suggestion of immunity made September 25 and October 9, 1970 in this action commenced January 31, 1968, second amended complaint filed October 17, 1969, answer thereto dated December 16, 1969 and filed December 23, 1969 with counterclaim.

Conclusion

This case appears to us to be a case of first impression involving a question of great public concern. The right of the State Department to impair the obligations of a contract between parties has not to our knowledge been passed upon by this Court.

We respectfully submit that the issue herein involved is of sufficient general public importance that this Court should review it on petitioner's application in the interests of justice.

Respectfully submitted,

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September 28, 1971

APPENDIX A

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 928—September Term, 1970.

(Argued June 23, 1971 Decided July 27, 1971.)

Docket No. 71-1198

ISBRANDTSEN TANKERS, INC.,

Plaintiff-Appellant,

—v.—

PRESIDENT OF INDIA, Represented by the Director General of the INDIA SUPPLY MISSION,

Defendant-Appellee.

Before:

SMITH and HAYS, *Circuit Judges*, and POLLACK, *District Judge.**

Appeal from order and judgment of the United States District Court for the Southern District of New York, in admiralty, Thomas F. Croake, *Judge*, dismissing cause of action for damages for delay in discharging cargo from vessel. Affirmed.

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* United States District Judge for the Southern District of New York, sitting by designation.

WOODSON D. SCOTT, New York, N. Y. (Lord, Day & Lord, New York, N. Y.) *for Appellant.*

EBERHARD P. DEUTSCH, New Orleans, La. (Deutsch, Kerrigan & Stiles, New Orleans, La., H. Barton Williams and Charles L. Trowbridge, of counsel), *for Appellee.*

SMITH, *Circuit Judge*:

Appellant shipowner instituted suit in the United States District Court for the Southern District of New York against the defendant-appellee, seeking damages resulting from alleged delays of its vessels during October and November of 1966 near the port of Calcutta. The District Court (Thomas F. Croake, *Judge*) dismissed one of the three causes of action alleged in appellant's second amended complaint, and the shipowner appeals.[1] We find no error and affirm the dismissal.

The dismissal by Judge Croake was premised upon a formal written suggestion of immunity by the United States Department of State, transmitted through the office of the United States Attorney General, after hearings and the filing of briefs with the State Department.

Appellant shipowner and appellee entered into a charter party in July of 1966 for the transportation of grain to India. The shipment was part of a massive effort on the part of the Indian government to end a food shortage, re-

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[1] The parties have assumed that the order is appealable under 28 U.S.C. § 1292(a)(3) as a decree in admiralty determining rights and liabilities of the parties, even though other claims remain unresolved. We conclude that the appeal will lie. See 9 Moore Federal Practice 2d Ed. ¶110.19 [3] n. 10; *Crews* v. *The Arundel Corp.*, 386 F.2d 528 (5 Cir. 1967). But cf. *Albatross Shipping Corp.* v. *Stewart*, 326 F.2d 208 (5 Cir. 1964), *The Maria*, 67 F.2d 571 (2d Cir. 1933).

sulting from an extreme drought in 1965 and 1966. The cause of action which is the subject of this appeal sought damages for improper and unreasonable detention of appellant's vessels,[2] preventing discharge of their cargo and causing substantial loss of time and money. Appellant contends that notwithstanding the advisory letter from the State Department recommending immunity, the District Court has jurisdiction in this matter because of the existence of a waiver of immunity by appellee, said to be contained in paragraph 34 of the contract charter between the parties.[3] Additionally, appellant argues that the appearance by appellee by means of serving and filing answering papers constitutes a waiver of any sovereign immunity that may have previously existed.

Whether or not these arguments possess logical force, in cases involving the governments of foreign powers the judiciary has candidly admitted that there exist interests beyond those of purely legal concern. A judicial decision against the government of a foreign nation can conceivably cause severe international repercussions, the full consequences of which the courts are in no position to predict. As this court noted in *Victory Transport, Inc.* v. *Comisaria*

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[2] The transport ships were of the tanker type. By reason of their size they were unable to negotiate the Hooghly River to the port of Calcutta. In accordance with arrangements set forth in the charter parties, these ships transferred their cargoes at a number of "lightening anchorages" off the east coast of India into smaller "lightening vessels," employed by the shipowners for the purpose of delivering the cargo to Calcutta. Allegedly because of the large number of vessels, these carriers were obliged to wait their turn for a certain period of time in the Bay of Bengal, before completing the transport up the Hooghly River to Calcutta.

[3] Paragraph 34 of the charter party provides:

Any and all differences and disputes arising under this Charter Party are to be determined by the U.S. Courts for the Southern District of New York, but this does not preclude a party from pursuing any *in rem* proceedings in another jurisdiction or from submission by mutual agreement of any differences or disputes to arbitration.

General, 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965), "[i]n delineating the scope of a doctrine designed to avert possible embarrassment to the conduct of our foreign relations, the courts have quite naturally deferred to the policy pronouncements of the State Department." See also, *National City Bank of New York* v. *Republic of China,* 348 U.S. 356, 360-361 (1955).

Appellant emphasizes that traditionally, sovereign immunity has been afforded to foreign governments only in regard to actions of a public, as opposed to a private/commercial, nature. Here, it is contended, the actions of the Indian government were wholly concerned with a commercial purchase of grain, and therefore do not concern matters of public policy or governmental discretion. This argument is premised upon the famed letter of Jack B. Tate, Acting Legal Advisor to the State Department, to Philip B. Perlman, Acting Attorney General, dated May 19, 1952 [appearing in 26 State Dept. Bull. 984 (1952)], indicating that it was the policy of our government to adopt the restrictive theory of sovereign immunity, i.e. to grant immunity to acts of a public nature, and to deny it to those of a private nature.

This proposed distinction between acts which are *jure imperii* (which are to be afforded immunity) and those which are *jure gestionis* (which are not), has never been adequately defined, and in fact has been viewed as unworkable by many commentators.[4] In *Victory Transport,* this court adopted the view that acts which are *jure imperii* would be limited to the following:

(1) internal administrative acts, such as expulsion of an alien;

(2) legislative acts, such as nationalization;

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[4] See, e.g., Lauterpacht, "The Problems of Jurisdictional Immunities of Foreign States," 28 *Brit. Y.B. Int'l L.* 220, 225-26 (1951); Fitzmaurice, "State Immunity from Proceedings in Foreign Courts," 14 *Brit. Y.B. Int'l L.* 101, 123-24 (1933).

(3) acts concerning the armed forces;

(4) acts concerning diplomatic activity;

(5) public loans.

336 F.2d at 360.

Were we required to apply this distinction, as defined, to the facts of the present case, we might well find that the actions of the Indian government were, as appellant contends, purely private commercial decisions.

It is true that the mere fact that a contract with a private commercial interest is involved does not automatically render the acts of the foreign government private and commercial. As this court recently noted:

> The view that all contracts, regardless of their purpose, should be deemed "private" or "commercial" acts would lead to the conclusion that a contract by a foreign government for the purchase of bullets for its army or for the erection of fortifications do not constitute sovereign acts—a result we viewed as "rather astonishing" in *Victory Transport,* 336 F.2d at 359. [*Heaney* v. *The Government of Spain,* —— F.2d —— (2d Cir., July 2, 1971), slip op. p. 3971, 3976.]

In *Victory Transport,* the contract was, as here, for the carriage of grain, and in the absence of State Department action, jurisdiction was upheld. See also, *Petrol Shipping* v. *Kingdom of Greece,* 360 F.2d 103 (2d Cir. 1966).

In situations where the State Department has given a formal recommendation, however, the courts need not reach questions of this type. The State Department is to make this determination, in light of the potential consequences to our own international position. Hence once the State Department has ruled in a matter of this nature, the judiciary will not interfere. See *Republic of Mexico* v. *Hoffman,* 324 U.S. 30, 35 (1945).

Appellant attempts to distinguish the precedents in this area by noting that in none of them had the foreign sovereign contracted to waive its immunity. It is true that in situations where the Executive Branch has made no formal recommendation a foreign sovereign may be held to have waived its immunity. In *National City Bank of New York* v. *Republic of China, supra,* at 364, for example, the Supreme Court held that where a sovereign has itself brought suit, it is not immune from a counterclaim arising out of the same subject matter as the suit itself. In that same opinion, however, the Court noted that "[t]he status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court." 348 U.S. at 358.

The potential harm or embarrassment resulting to our government from a judicial finding of jurisdiction, in the face of an Executive recommendation to the contrary, may be just as severe where the foreign sovereign had initially contracted to waive its claim of sovereign immunity as where it had not done so. Though we sympathize with appellant because of the difficult position in which such a holding places it, we have no alternative but to accept the recommendation of the State Department.

The order of the District Court dismissing appellant's second cause of action is affirmed.

APPENDIX B

Order of Judge Croake in the District Court

ISBRANDTSEN TANKERS, INC., Plaintiff, v. PRESIDENT OF INDIA, REPRESENTED BY THE DIRECTOR GENERAL OF THE INDIA SUPPLY MISSION, Defendant. 68-Civ. 407.

Defendant has moved pursuant to Rule 12(f) of the Federal Rules of Civil Procedure for an order striking plaintiff's second cause of action for detention damages as set forth in plaintiff's second amended complaint on grounds that defendant is entitled to sovereign immunity.

In *Banco Nacional de Cuba* v. *Farr,* 243 F. Supp. 957, 976-977 (1965), Judge vP. Bryan of this court held--

> "It is quite clear that the Executive may tell the courts when it is in the national interest to grant sovereign immunity to a foreign state, and that suggestion by the Executive is conclusive. *Ex parte Republic of Peru,* 318 U. S. 578, *Rich* v. *Naviera Vacuba S.A.,* 295 F. 2d 24 (4th Cir. 1961). The primacy that the Constitution delegates to the political branches in the field of foreign affairs dictates such a result."

In the case now before us, the Executive has made such a recommendation of immunity from suit. Accordingly, defendant's motion is granted.

So ORDERED.

Dated: New York, N. Y.
January 13, 1971

Thomas F. Croake
U. S. D. J.

U. S. DISTRICT COURT
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